



**American Express Company**  
General Counsel's Office  
200 Vesey Street  
New York, NY 10285

December 21, 2009

***Via E-Mail***

Jennifer J. Johnson  
Secretary, Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW  
Washington, DC 20551  
Attention: Docket No. R-1377

Re: Proposed Rule – 12 CFR Part 205  
Regulation E; Docket No. R-1377  
Electronic Funds Transfer

Dear Ms. Johnson,

American Express is pleased to provide our comments on the Federal Reserve Board's (the "Board") proposed amendments to Regulation E to implement certain provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "CARD Act"), published in the Federal Register on November 20, 2009. These amendments (the "proposed rules" or the "proposal") would, among other things, restrict the ability to impose dormancy, inactivity or service fees on certain prepaid products and prohibit the sale or issuance of such products if they have an expiration date of less than five years.

As an initial matter, American Express applauds the Board for the clear care and thoughtfulness with which they have approached the task of implementing the prepaid card-related provisions of the CARD Act and proposed rules that fulfill the consumer protection objectives of the CARD Act. As a major issuer of open-loop gift cards, American Express has long been committed to ensuring that the purchasers and users of its prepaid gift cards are fully informed and protected, and is proud to have been the first major issuer of open-loop gift cards to eliminate all fees after purchase, including monthly service fees, on September 30, 2009. We greatly appreciate the opportunity to comment upon the issues raised in the proposal, and our comments with respect to certain, specific aspects of the proposed rules are set forth below.

I. Clarification of Activities that Do Not Constitute “Marketing” of Reloadable General Purposes Cards as Gift Cards.

Section 205.20(b) of the CARD Act excludes from its restrictions a general use prepaid card that is reloadable and not marketed or labeled as a gift card or gift certificate. The Board solicits comment regarding the marketing and labeling of gift cards in section 20(b)(2)-3 of the proposed rules. We believe it would be helpful for the Board to clarify that certain activity does not qualify as “marketing” under this provision. For example, any marketing, commercials or in-store advertisements that do not specifically reference a particular excluded card, but that instead generally reference the availability of gift cards in a store should not nullify the exclusion for any excluded cards that may also be available at the same store. General marketing of availability of gift cards in a store, with no reference to specific cards, merely informs consumers of the availability of such cards in the store and creates no meaningful confusion on the part of consumers as to whether non-gift, general-purpose reloadable cards sold at the same location might be gift cards that are regulated under the CARD Act. Rather, when considering a specific prepaid card purchase, consumers will look to either (i) the card design and packaging itself or (ii) marketing or advertising specific to that card, the substance and contents of which we believe should be the sole basis on which a prepaid card should be deemed “marketed or labeled as a gift card” for purposes of Section 205.20 of the CARD Act.

An alternative, over-inclusive approach to this issue would effectively require retailers to suppress general gift card marketing activity in order to avoid violating the exclusionary language for general-purpose reloadable cards. This could lead to a drop in sales of all gift cards and prepaid products and potentially harm the unbanked and the underbanked by forcing retailers and issuers to choose between sales of a wide variety of gift cards or the much smaller product offerings of general-purpose reloadable cards. Retailers that risk being sued or deemed to be noncompliant with the law may simply choose not to offer general-purpose reloadable cards for sale, which would effectively make such products inaccessible to consumers that cannot purchase them online (e.g., because they either do not have ready access to the internet or prefer not to transact electronically because of security concerns).

II. Provision of Supplemental Cards or Cards in the Name of Additional Holders Should Not be Deemed “Gifting” of General-Purpose Reloadable Cards.

As referenced above, Section 205.20(b) of the CARD Act excludes from its restrictions a general use prepaid card that is reloadable and not marketed or labeled as a gift card or gift certificate. The proposed rules clarify that the term “marketed or labeled as a gift card or gift certificate” means “directly or indirectly offering, advertising or otherwise suggesting the potential use of a card, code or other device, as a gift for another person.” Many general-purpose reloadable cards allow the purchaser or cardholder to arrange for a card to be issued to or in the name of another person or for any another person to be an authorized user of the card, and advertise such benefit, for reasons other than gifting. For example, some general-purpose reloadable cards provide the cardholder or purchaser with an opportunity to arrange for a family member or other third party to be an authorized user of their card and send a secondary or supplemental card to him or her. Other general-purpose reloadable cards enable a parent to have a card issued in the name, and sent, to a family member or third party as a method to facilitate or manage that person’s spending on a prepaid basis. We believe that, to avoid any confusion, the proposed rules should be modified to make clear that the marketing of a card in these and similar cases (i.e., in which a card is given to or issued in the name of an affiliated person

without a true gift purpose) is not considered marketing such general-purpose reloadable card as a “gift.”

### III. Temporary and Permanent Cards.

The Board has requested comments on the treatment of non-gift general-purpose reloadable cards that are designed to be converted from a temporary card into a personally identifiable general-purpose reloadable card. On the one hand, the Board expressed concern that the exclusion of such cards could lead to a lack of protection for consumers that elect not to register and therefore never receive a reloadable card. On the other hand, the Board recognized that if such cards are not excluded, the exclusion for reloadable cards not marketed as gift cards would effectively be nullified for many general-purpose reloadable cards. To address the first concern, we suggest that the Board protect purchasers of temporary cards by requiring issuers and distributors to either (i) ensure that the temporary card complies with the fee and other restrictions applicable to gift cards or (ii) provide conspicuous disclosure on the packaging materials that accompany the temporary card that makes clear that (A) the card is not a gift card, (B) the card must be registered before it may be reloaded, and (C) fees (including those not permitted for gift cards) may be imposed even if the purchaser does not register the card. To address the second concern, we urge the Board to exclude the permanent, reloadable cards that replace the temporary cards sold at retail from regulation under the CARD Act. We believe that such an approach would appropriately balance the dual goals of implementing the CARD Act’s exclusion for reloadable, non-gift prepaid cards and implementing the consumer protections it affords to gift cards.

### IV. Alternatives Regarding Card “Valid Thru” Dates and Funds Expiration.

The Board has proposed two alternatives regarding the disclosure of the expiration date of underlying funds and the card itself in Section 205.20(e) of the proposed rules and solicited comment on the two proposed alternatives. Under Alternative A to Section 205.20(e) of the Proposed Rules, a person may not sell a gift certificate, store gift card, or general-use prepaid card subject to an expiration date unless the certificate or card expiration date is at least five years after the date the certificate or card is sold or issued to a consumer. Under Alternative B to Section 205.20(e) of the Proposed Rules, a person may not sell or issue a card with an expiration date unless there are policies and procedures in place to ensure a consumer has a reasonable opportunity to purchase a card with at least five years remaining until the expiration date.

As a preliminary matter, we do not believe that it is appropriate to construe a gift card’s “valid thru” date as the “expiration date” of such card for purposes of the CARD Act; rather, one should look to the date on which the cardholder loses his or her right to the funds to which the card provides access as to the “expiration date.” We believe that this construction is appropriate, at the very least, in cases where (i) the underlying funds never expire, regardless of the card’s valid thru date, (ii) the issuer provides a free, replacement card if the valid thru date has passed, (iii) the issuer provides clear instructions on how to obtain the replacement card in materials accompanying the card or on the card itself, and (iv) the card is an open-loop, network-branded card (with respect to which consumers typically understand, through their experiences with debit, credit and charge cards operating on the same networks, that a valid thru date is separate and apart from the holder’s ongoing relationship with the card issuer).

However, if the Board feels that construing “expiration date” as pertaining to funds expiration only creates a potential, untenable gap in consumer protection under the CARD Act that must be addressed in the proposed rules, American Express would be supportive of Alternative A and Alternative B and would urge the Board to adopt both alternatives to address this issue, so long as there is an ample time to grandfather cards in the marketplace, as discussed below. Adopting Alternative A alone would likely impose technological challenges to the sellers of the cards, which would need to determine at point-of-sale and before purchase if enough time remains before the plastic expires on the card. Due to the variety of seller types and their differing level of technology and ability to invest in upgrades, adopting this alternative alone would prevent some retail outlets, especially smaller retailers, from being able to comply with the alternative and could result in such retailers simply stopping the sale of such cards altogether. Greater flexibility and a more streamlined process would likely result for issuers, retailers and consumers alike if both Alternative A and Alternative B were adopted.

V. Transition.

The Board solicits comment on whether it should consider rules to grandfather gift certificates, store gift cards or general-use prepaid cards that are in the marketplace as of the effective date of the rule from some or all of the requirements set forth in the rulemaking. As an initial matter, we note that because of the primarily retail-focused method by which gift cards are sold, at any given time gift card issuers have a large number of cards available for sale and in inventory across a large number of retail locations. If no grandfather period were provided for such cards, gift card issuers (including American Express and others) would be subject to extraordinary, one-time costs to restock all retail locations. In addition, because of security concerns posed by obsolete cards, they would also be subject to a similarly large, one-time cost associated with ensuring and verifying the destruction of all cards to be replaced. We believe that the costs of such a massive inventory exchange would greatly outweigh any potential benefits to consumers, and that consumers could be much more efficiently protected in the immediate period after the final rules become effective by ensuring that issuers comply with the substance of the CARD Act’s key restrictions.

To avoid costly and burdensome inventory exchanges for gift cards that are unlikely to provide any meaningful benefit to consumers, we request that the Board provide a twenty-four month grandfather period for gift cards that are distributed in stores prior to the effective date of the final regulations in cases where the issuer of such gift cards (i) observes, in practice, all fee restrictions contained in the CARD Act and implementing rules and (ii) provides, at no cost to the consumer, a free replacement gift card upon request with respect to any gift card of which the “valid thru” date has passed. Such a period will allow issuers, program managers, distributors and sellers to comply with all of the requirements set forth in the final rules and permit issuers to add the required disclosures and arrange for issuance and distribution of new cards with new “valid thru” or funds expiry terms, while still protecting consumers in a manner consistent with the spirit of the CARD Act.

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On behalf of American Express, I thank you for the opportunity to comment on this important matter.

Sincerely,

A handwritten signature in cursive script that reads "Jeremy R. Newell".

Jeremy R. Newell  
Counsel  
American Express